IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 14TH FEBRUARY 2007 / 25TH MAGHA 1928

Crl.MC.No. 2712 of 2006()

SC.106/2006 of ADDL.ASSISTANT SESSIONS COURT, THALASSERY
CP.79/2005 of ADDL.CHIEF JUDICIAL MAGISTRATE COURT, THALASSERY

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PETITIONER: ACCUSED NO.1 AND 2

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1. P.KUNHI BAVA,
   RETD. SUB INSPECTOR OF POLICE, S/O. IMBICHI,
   PATTANI HOUSE, P.O.PALAPETTI,
   SCHOOLPADI, MALAPPURAM DISTRICT.

2. C.DAMODARAN,
   RETD. ASSISTANT SUB INSPECTOR,
   CHEROLI HOUSE, P.O.KOORARRA,
   MALAPPURAM DISTRICT.

BY ADV. SRI.K.V.SOHAN
SMT.SREEJA SOHAN.K.
SMT.SANJANA R.NAIR

RESPONDENTS: COMPLAINANT, ACCUSED NO.3 & STATE

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1. THAZHEPURAM NABEESU,
   T.P.HOUSE, MAVILAYIL AMSOM,
   KEEZHUNNA P.O., KANNUR DISTRICT.

2. M.SURESH, P.C.NO.2973,
   TRAFFIC POLICE STATION, TELLICHERRY-1.

3. STATE OF KERALA, REP. BY
   PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.GRASHIOUS KURIAKOSE
PUBLIC PROSECUTOR SRI.GIKKU JACOB

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 14/02/2007 , THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.No.2712 of 2006

Dated this the 14th day of February 2007

O R D E R

The petitioners are accused 1 and 2 in a prosecution initiated against three persons (the second respondent herein is the third accused) under Sections 323, 506(II) and 302 read with 34 I.P.C. The said proceedings has been initiated against them by the first respondent herein. The first respondent is the mother of the deceased person - one Mujeeb by name. Cognizance was taken by the learned Magistrate. The necessary enquiry was conducted. The second respondent/second petitioner herein did not participate in the enquiry. The learned Magistrate, by the impugned order, has committed accused 1 and 3 to the court of Session to face allegations interalia under Section 302 I.P.C. Both the petitioners have assailed the cognizance taken by the learned Magistrate . The first petitioner assails the order of committal also. The second respondent has not entered appearance but the learned counsel for the petitioner contends that the contentions urged would apply to the second respondent herein also who is the third accused who has also been committed to the court of Session as per the

impugned order.

2. The crux of the allegations against the accused persons is that they, being Additional Sub Inspector of Police and Police Constables attached to the crime detection party of the Thalassery police station, in the course of investigation of a crime after apprehending two accused persons, went in search of the son of the complainant. He was traced. The said person Mujeeb took to his heals to escape from the police party. The police party consisting of the accused persons chased the said Mujeeb. While he was running away, he fell into a well. There is an allegation that he was pushed into the well. After he fell into the well, there was an attempt to get him out of the well. A heavy stone was allegedly thrown into the well by the members of the police party which allegedly hit the deceased on his head and he later succumbed to such injury suffered by him. These, in short, are the allegations raised.

3. The learned counsel for the petitioners submits that the very cognizance taken by the learned Magistrate violates the mandates of Section 197 Cr.P.C and therefore the entire

proceedings is bad and vitiated for want of the requisite sanction under Section 197 Cr.P.C. The learned counsel, in these circumstances, prays that the cognizance taken by the learned Magistrate may be set aside.

4. The petitioners, admittedly, are not public servants not removable from his office save by or with the sanction of the Government. Section 197(1) Cr.P.C does not therefore admittedly apply to them.

5. A contention is raised that under the notification issued by the State Government under Section 197(3) Cr.P.C dated 06/12/1977, the petitioners are entitled to the protection of Section 197(2) Cr.P.C and that the petitioners are claiming the protection not under Section 197(1) but under Section 197(2) Cr.P.C on the strength of the notification dated 06/12/1977 issued under Section 197(3) Cr.P.C.

6. There has been a controversy as to whether the said notification which offers protection to the officials of the police force engaged in law and order duty would make them eligible to claim the protection of Section 197(2) Cr.P.C. But the said

question appears to be concluded by the decision of a Division Bench of this court in Sarojini v. Prasannan [1996(2) KLT 859]. The learned counsel for the petitioners submits that it is not necessary to rely on the said decision any more in the light of the later decision of the Supreme Court in Rizwan Ahmed Javed Shaikh v. Jammal Patel [2001 SC 2198]. In both these decisions, the earlier decision of the Single Bench of this court in Muhammed v. Sasi [1985 KLT 404] has been considered and disapproved. I am of the opinion that it is not necessary to consider that question in any further detail as the decision in Rizwan Ahmed Javed Shaikh v. Jammal Patel [AIR 2001 SC 2198] squarely covers the issue and protects officers/officials like the petitioners who fall within the sweep of the members of the Kerala Police Force, which force is charged with the maintenance of public order. It is, therefore, not necessary to pointedly consider the question whether the petitioners who are admittedly members of the Kerala Police Force were engaged in maintenance of public order or maintenance of law and order. In the light of the decision of the Supreme Court in Rizwan Ahmed

Javed Shaikh v. Jammal Patel [AIR 2001 SC 2198] the petitioners who fall within the sweep of the notification – being members of the Kerala Police Force are certainly entitled to the protection of Section 197(2) Cr.P.C.

7. While the learned counsel for the petitioners submits that all the accused persons were acting (or purporting to act) in the discharge of their official duty, the learned counsel for the respondent/complainant contends that the precise overt acts alleged against the accused persons must lead the court to the conclusion that they were not acting or purporting to act in the discharge of their official duty. Pushing a person into the well and throwing a stone on the head of the person who had fallen into the well cannot be held to be acts falling within the sweep of the expression " acting or purporting to act in the discharge of official duty" of such public servants. Therefore, they are not entitled to the protection of Section 197(2), at any rate, contends the learned counsel for the respondent.

8. This question as to how the expression "acting or purporting to act in the discharge of official duty" is to be

understood has been the subject matter of discussion in several judicial precedents. One of the earliest decision on the point is that by the Constitutional Bench in Matajog Dobey v. H.C.Bhari [AIR 1956 SC 44]. The Bench said as extracted below on the test to be adopted for finding out whether Section 197 of the code was attracted or not. The said passage is extracted with approval in the latest decision on this aspect by the Supreme Court in Sankaran Moitra v. Sadhna Das [AIR 2006 SC 1599].

> " Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code: "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". But the difference is only in language and not in substance. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merit. What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the

needs and requirements of the situation."

9. The principle though clearly stated presents practical problems in its applications. Two Judge Bench of the Supreme Court in Rizwan Ahmed Javed Shaikh v. Jammal Patel AIR 2001 SC 2198 adverted to the earlier observations of the Supreme Court in S.B.Saha v. K.S.Kochar [AIR 1979 SC 1841] where this dilemma was referred to the Supreme Court in the following words.

> " The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, "it is not part of an official duty to commit an offence, and never can be". In the wider sense, these words will take under their umbrella every act constituting an offence committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1) an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision. As pointed out by Ramaswami.K in

> Baijnath v. State of Madhya Pradesh, AIR 1966 SC 220 at P.222 "It is the quality of the Act that is important and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted."
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> (emphasis supplied)

10. The real test to be applied is reiterated in the same decision in paragraph 15 in the following words which have been accepted by the three Judge Bench in Sankaran Moitra v. Sadhna Das [AIR 2006 SC 1599] also in paragraph 15 of Rizwan Ahmed Javed Shaikh v. Jammal Patel AIR 2001 SC 2198:

> "The real test to be applied to attract the applicability of Section 197(3) is whether the act which is done by a public officer and is alleged to constitute an offence was done by the public officer whilst acting in his official capacity though what he did was neither his duty nor his right to do as such public officer. The act complained of may be in exercise of the duty or in the absence of such duty or in dereliction of the duty, if the act complained of is done while acting as the public officer and in the course of the same transaction in which the official duty was performed or purports to be performed, the public officer would be protected."
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> (emphasis supplied)

11. The question again is one of applying this real test to the facts scenario available in this case. The learned counsel for

the respondent clearly concedes that for all acts done till the deceased who was chased by the petitioners reached the well would qualify for protection under Section 197 Cr.P.C. So far, there is no controversy. The crucial question is hence whether the act which led to the deceased falling into the well and the alleged subsequent throwing of the stone into the well after exhorting the accused to come out would qualify for exemption under Section 197 Cr.P.C.

12. It is of course not the duty of any public servant to commit any offence. At the same time every culpable act committed by him under the cloak or the cover of his official duty will not qualify him for protection under Section 197 Cr.P.C. Alert appreciation of facts is necessary. Without any dispute, the deceased was required by the petitioners, in accordance with law, to be arrested. They were justified in chasing him to ensure his arrest. Even after he fell into the well, the petitioners were obliged to save him and get him out of the well to arrest him, in accordance with law. It can certainly be said that it is not part of the official duty to throw a stone into the well at a person who

while being chased had fallen into the well. But according to me, in any view of the matter, the petitioners cannot be denied the protection of Section 197 Cr.P.C in as much as they were essentially performing the function in the discharge of their official duty – of attempting to arrest the deceased who was required to be arrested in accordance with law. Throwing a stone into the well even if it be for the purpose of ensuring that the deceased comes out of the well may not be strictly justified; but at any rate, it cannot be held that such conduct was totally outside the official duty of the petitioners. They were essentially performing official duty and were acting or purporting to act in the discharge of their official duty for the purpose of Section 197 Cr.P.C and to me, it will be imprudent and irrational to cull out the one alleged act of throwing a stone into the well where the deceased accused had fallen, to take it out of the sweep of Section 197 Cr.P.C.

13. It follows from the above discussions that applying the real test enumerated in Rizwan Ahmed Javed Shaikh v. Jammal Patel [AIR 2001 SC 2198] accepted in Sankaran AIR 2006 SC

1599 the conclusion is safe that the accused persons that is petitioners 1 and 2 herein and the second respondent/the third accused are entitled to the protection of Section 197(2) on the strength of the notification under Section 197(3) Cr.P.c dated 06/12/1977. Cognizance taken must therefore be held to be bad in law.

14. This Criminal Miscellaneous Case is in these circumstances allowed. Cognizance taken by the learned Magistrate and all subsequent acts including C.P.79/05 and S.C.No.106/06 against the petitioners as also the second respondent are quashed. This order will not in any way fetter the liberty of the first respondent to prosecute the accused if and after obtaining the requisite sanction under Section 197 of the Cr.P.C, in accordance with law.

(R.BASANT, JUDGE)

jsr

R.BASANT, J

C.R.R.P.No.

ORDER

21ST DAY OF JULY 2006